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No. 80-6045

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RUBIN KREMER, PETITIONER

v.

CHEMICAL CONSTRUCTION CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the following question:

Whether a state administrative agency's adjudication of a state discrimination claim that has been affirmed by a state appellate court has any preclusive effect on federal court adjudication of a Title VII claim.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner, a Jew who immigrated to this country from Poland in 1970, was employed as an engineer by respondent Chemical Construction Corporation (Pet. 2). He claims that he was discharged and was not rehired by respondent because of his religion and national origin (Pet. App. A.1, A.12).

Proceedings on the State Claim

Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), asserting that respondent had discriminated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a). As required by Title VII and its regulations,[1/] the EEOC referred the charge to the appropriate state administrative agency, the New York State Division of Human Rights ("NYHRD"), to determine whether respondent's actions violated the state anti-

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1/ 42 U.S.C. 2000e-5(c); 29 C.F.R. 1601.12(b)(1)(iii),(iv). See Love v. Pullman Co., 404 U.S. 522 (1972).

discrimination law, N.Y. Exec. Law §296 (McKinney Supp. 1972-1980) (Pet. App. A.1, A.12).

The NYHRD determined, after an investigation, that there was no probable cause to believe that respondent had violated the New York statute (Pet. App. A.2; id. at A.12-A.13 & n.1). Petitioner pursued an administrative appeal to the State Human Rights Appeal Board; the Appeal Board concluded, pursuant to N.Y. Exec. Law §297-a(7)(e) (McKinney 1972), that the NYHRD's determination was "not arbitrary, capricious or an abuse of discretion" (Pet. App. A.13). Attached to the order of the Appeal Board was a notice stating that petitioner could obtain judicial review by filing a petition in the appropriate Appellate Division of the New York Supreme Court (Pet. App. A.2).

Petitioner, who appeared pro se throughout the state proceedings, requested the Appellate Division, First Department, to set aside the order of the Appeal Board pursuant to N.Y. Exec. Law §298 (McKinney Supp. 1972-1980) and N.Y. C.P.L.R. art. 78 (McKinney 1963) (Pet. App. A.2, A.13). After a review of the administrative record, the Appellate Division unanimously "confirmed" the order of the Appeal Board (Pet. App. A.2, A.13).

Proceedings on the Federal Claim

Petitioner renewed his claim before the EEOC. Based upon "the [NYHRD's] findings, the complaint, and the record" (Pet. App. A.31), the District Director of the EEOC determined that there was no reasonable cause to believe that Title VII had been violated (Pet. App. A.2, A.13-A.14). The District Director issued petitioner a right-to-sue letter, informing petitioner that he was entitled to bring his Title VII claim in federal court (Pet. App. A.14).

Petitioner then filed this action in the United States District Court for the Southern District of New York, asserting a claim under Title VII (Pet. App. A.3, A.14). Respondent moved to dismiss the complaint under Fed. R. Civ. P. 12(b) or,

alternatively, for summary judgment under Fed. R. Civ. P. 56 on the ground of res judicata. The district court denied the motion (Pet. App. A.28-A.39; 464 F. Supp. 468).

Thereafter, in an unrelated case, the United States Court of Appeals for the Second Circuit held that the doctrine of res judicata bars adjudication of a Title VII claim in federal court following adjudication of a state discrimination claim by a state administrative agency and review of the administrative record by a state appellate court. Sinicropi v. Nassau County, 601 F.2d 60, 62 (2d Cir.), cert. denied, 444 U.S. 983 (1979). The court of appeals' brief, per curiam decision in Sinicropi relied solely upon Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977), a case arising under 42 U.S.C. 1981. The court in Mitchell had reasoned that a state agency proceeding affords an "adjudicatory process comparable" to federal court adjudication (553 F.2d at 270-271), and that under 28 U.S.C. 1738 the affirmance of a state agency's determination by a state appellate court creates a res judicata bar to a federal court action (id. at 271-277).

Following the decision in Sinicropi, respondent renewed its motion to dismiss petitioner's complaint. This time the district court granted respondent's motion (Pet. App. A.12-A.27; 477 F. Supp. 587), observing that "Sinicropi permits no choice but to dismiss plaintiff's complaint * * * on grounds of res judicata" (Pet. App. A.17). The court of appeals affirmed on the basis of its decision in Sinicropi (Pet. App. A.1-A.11; 623 F.2d 786).

DISCUSSION

This case raises an important question concerning the right of a Title VII plaintiff to pursue his federal discrimination claim in federal court. The particular issue presented is whether a person alleging employment discrimination under Title VII is precluded from bringing an action in federal court following the affirmance by a state appellate court of a state

agency's denial of a discrimination claim brought under state law and arising from the same conduct.[2] The decision below is contrary to the decisions of other courts of appeals and is inconsistent with the statutory scheme of Title VII, which provides for recourse to state procedures as well as to federal court actions as part of a comprehensive scheme of overlapping remedies to combat employment discrimination. The court of appeals' decision would frustrate the broad remedial purpose of Title VII by foreclosing federal litigation of discrimination claims by unwary Title VII complainants. By the same token, the effect of the decision below would be to deter complainants from pursuing their remedies in the state courts, thus undermining the congressional policy of deferring to adjudication of discrimination complaints at the state level. Review by this Court is therefore warranted.[3]

2/ We believe that the preclusion question encompasses both res judicata and collateral estoppel principles. See Allen v. McCurry, No. 79-385 (Dec. 9, 1980). Although both petitioner and the court of appeals have referred exclusively to "res judicata," the question does not fit neatly into the traditional concept of res judicata. Res judicata traditionally applies to bar a claim that was brought or could have been brought in a particular lawsuit. See Allen v. McCurry, supra, slip op. 4. We do not believe that petitioner brought or could have brought his Title VII claim before the state agency. As far as we are aware, petitioner brought only a state discrimination claim before the state agency; it is not at all clear whether that agency also had jurisdiction under state law over his Title VII claim. See N.Y. Exec. Law §§ 296, 300 (McKinney Supp. 1972-1980). Agencies in other states often have jurisdiction under state law over state claims only. See Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1084 (8th Cir.), cert. denied, 446 U.S. 966 (1980). Even if the state agency had jurisdiction over the Title VII claim as a matter of state law, we believe that Title VII supersedes state law and deprives both state agencies and state courts of jurisdiction over Title VII claims (see page 7, note 6, infra). If the principles of res judicata do not apply, the question remains whether a state adjudication has any preclusive effect on federal adjudication by way of collateral estoppel or some other theory.

3/ We do not believe that review is warranted with respect to Question 2 presented in the petition for certiorari, i.e., whether the Second Circuit's decision in Sinicropi v. Nassau County, supra, should be given retroactive effect (see Pet. 15-16 n.*). Resolution of the retroactivity question involves the application of settled principles (see Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)) and turns on a determination of the particular state of the law in the circuit prior to Sinicropi.

1. The decision below is in conflict with the decisions of the Third Circuit in Smouse v. General Electric Co., 626 F.2d 333, 334-336 (1980), and the Eighth Circuit in Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1083-1084, cert. denied, 446 U.S. 966 (1980), holding that a state agency's adjudication of a state discrimination claim -- even after review by a state appellate court -- has no preclusive effect on federal court adjudication of a Title VII claim. While it is true, as respondent points out (Br. in Opp. 13-14), that in both Smouse and Gunther, unlike here, the defendant-employer had initiated judicial review in state court of a state agency determination favorable to the complainant, both courts expressed their disagreement with the Second Circuit's opinion in Sinicropi v. Nassau County, supra, and indicated that their decisions did not turn on which party seeks state court review. See Smouse, supra, 626 F.2d at 336; Gunther, supra, 612 F.2d at 1084 n.6.4/

The decision of the Second Circuit in this case also conflicts in principle with Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978), Garner v. Giarruso, 571 F.2d 1330 (5th Cir. 1978), Cooper v. Phillip Morris, Inc., 464 F.2d 9 (6th Cir. 1972), and Batiste v. Furnco Construction Corp., 503 F.2d 447 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975), which hold that federal court adjudication of a Title VII claim is not foreclosed by a state agency's adjudication of a state discrimination claim. We recognize that in each of those cases review of the state agency determination was not pursued in state court, but that distinction does not necessarily provide a basis for reconciling those cases with the decision below. In United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-422 (1966), this Court noted that an administrative agency adjudication may, in appropriate circumstances, be entitled to preclusive effect in

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4/ We note that this Court denied certiorari in Sinicropi prior to the decisions in Smouse and Gunther.

subsequent judicial proceedings. Thus, while 28 U.S.C. 1738 may not require federal courts to give preclusive effect to state administrative agency adjudications,5/ judically-created rules of preclusion may impose such a requirement. See Mitchell v. National Broadcasting Co., supra, 553 F.2d at 268-269. If the court below was correct in concluding that an adjudication by a state administrative agency that has been reviewed by a state appellate court precludes the bringing of a Title VII claim in federal court, then, under the reasoning of Utah Construction & Mining, preclusive effect may also attach in Title VII cases to a state administrative agency adjudication that has not been subjected to review in state court.

In sum, the decision below creates considerable uncertainty as to the availability of federal court actions under Title VII following presentation of a state discrimination claim to a state administrative agency, whether or not review of the state agency adjudication has been sought in state appellate court. This Court should grant review to resolve that uncertainty.

2. The decision below is inconsistent with the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and the decisions of this Court construing that statute.

a. It is settled that agency adjudication has no preclusive effect on court adjudication of Title VII claims. In Chandler v. Roudebush, 425 U.S. 840 (1976), this Court rejected the argument that an adjudication by the Civil Service Commission precluded court adjudication where the Commission's findings were supported by the clear weight of the evidence. After reviewing the language and legislative history of the 1972 amendments to Title VII (425 U.S. at 848-858), the Court concluded that Sections 706 and 717 gave to both private and federal employees a right to a "judicial trial de novo" (425 U.S. at 858), even after the

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5/ 28 U.S.C. 1738 applies only to prior "judicial proceedings."

completion of agency process. Similarly, in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), this Court stated that "an individual's cause of action is not barred by a Commission finding of no reasonable cause to believe that the statute has been violated." Id. at 48 n.8.

The court of appeals has held, in essence, that state appellate court review of a state agency determination converts an agency adjudication lacking preclusive effect into a court adjudication that bars further judicial proceedings. However, as this Court observed in Chandler v. Roudebush, supra, Congress recognized that "mere appellate review on a substantial-evidence basis following agency adjudication" is substantially different from "plenary adjudication of [complainants'] claims by a federal district court * * *." 425 U.S. at 857. The district court below correctly noted (Pet. App. A.18-A.19) that petitioner did not receive a "court adjudication" of his claim, as contemplated by Title VII; petitioner received no more than substantial-evidence review by a state appellate court. The court of appeals thus erred in concluding that the state court's substantial-evidence review was adequate to do service for the judicial trial de novo to which petitioner, as a Title VII complainant, is entitled.

b. Even if the court of appeals were correct, however, in holding that petitioner received an "adjudicatory process comparable" to court adjudication of his state claim, the court erred in not recognizing that Title VII provides petitioner with a right to federal court adjudication of his Title VII claim.6/ As this Court noted in Alexander v. Gardner-Denver Co., supra, 415 U.S. at 48-49 (emphasis added):

6/ In our amicus curiae brief in Minnick v. California Department of Corrections, No. 79-1213 (June 1, 1981), we argued (at pages 11-15) that federal jurisdiction over Title VII claims is exclusive. We are furnishing copies of that brief to the parties in this case.

> [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his right under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

Only last Term, this Court reiterated that "the 'ultimate authority' to secure compliance with Title VII resides in the federal courts." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980). In Carey, a complainant who had obtained in a state agency adjudication all the relief she had claimed except for an award of attorney's fees asserted that she had a right under Title VII to a federal court adjudication of her claim for attorney's fees. This Court agreed, and made the the following pertinent observations:

> Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums. §706(f)(1). One aspect of complete relief is an award of attorney's fees, which Congress considered necessary to the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of federal courts to enforce Title VII. For example, if state proceedings result in an injunction in favor of the complainant, but no award for backpay because state law does not authorize it, the complainant may proceed in federal court to "supplement" the state remedy.

447 U.S. at 67-68.

The decision below thus ignores the carefully crafted enforcement scheme of Title VII, which provides for recourse to federal court "when the State does not provide prompt or complete relief." New York Gaslight Club, Inc. v. Carey, supra, 447 U.S. at 65. While the court of appeals might have believed that the roles of the state and federal forums should be structured differently, "Congress has made the choice, and it is not for [the courts] to disturb it." Chandler v. Roudebush, supra, 425

U.S. at 864. Where, as here, Congress has by statute allowed parties to split related claims and defenses between state and federal forums, neither 28 U.S.C. 1738 nor the judicially-created doctrine of preclusion prevents the relitigation in federal court of claims and issues already litigated before a state tribunal. See Kalb v. Feuerstein, 308 U.S. 433, 443-444 (1940); Voutsis v. Union Carbide Corp., 452 F.2d 889, 893-894 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972); Restatement of Judgments, Second §61.2(1)(d) (Tent. Draft. No. 5, 1978).7/

Respondent's reliance (Br. in Opp. 15-17, 20) on this Court's recent decision in Allen v. McCurry, No. 79-935 (Dec. 9, 1980), is misplaced. In McCurry, this Court merely held that in enacting 42 U.S.C. 1983 Congress did not intend to permit plaintiffs to relitigate in federal court a claim already determined in state court. Nothing in McCurry suggests that its holding is applicable to Title VII, where, as this Court has noted, Congress specifically allowed plaintiffs to litigate claims independently in state and federal forums.

3. The consequences of the court of appeals' decision are not difficult to discern. As the district court predicted (Pet. App. A.24-A.25), the decision would cause the unwary, like petitioner, to lose their Title VII right to de novo trial in federal court. See Love v. Pullman Co., supra, 404 U.S. at 527. Moreover, the decision would induce the wary to forego state appellate court review of state agency adjudications, "thus encouraging further deterioration of state agency process due to much less frequent state court supervision" (Pet. App. A.22). In addition, as a result of the decision, complainants might withdraw from state agency proceedings prior to final adjudication for fear that the reasoning of Sinicropi would also

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7/ Of course, the state decision "may be admitted as evidence and accorded such weight as the [federal] court deems appropriate." Alexander v. Gardner-Denver Co., supra, 415 U.S. at 60; see also Ibid., n.21.

apply to unreviewed final agency adjudications. This would undermine Title VII's policy of encouraging state and local resolution of discrimination claims. See Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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